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ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FEEL BETTER KIDS, INC, AND FBK, Plaintiffs, v. KIDS IN NEED, INC., KIDS IN NEED USA, INC., CARS THAT HELP, INC., AUTO GOBBLER PARTS, INC., "JOHN DOE COMPANIES", ARTHUR GLASS IN HIS OFFICIAL CAPACITY as PRESIDENT of KIDS IN NEED USA, INC., ARTHUR GLASS in his official capacity as PRESIDENT of CARS THAT HELP, INC., and ARTHUR GLASS, individually, Defendants.	OPPOSITION TO MOTION FOR DEFAULT JUDGMENT CASE No.: 2:06-CV-00023 (DRH)

TO THE HONORABLE DENIS R. HURLEY, U.S, DISTRICT JUDGE:

COMES NOW, Cars that Help, Inc. and Arthur Glass, defendants in the above-captioned matter (hereinafter referred to collectively as **"Glass"**), and hereby motions the court for an order dismissing Plaintiff's motion for default judgment with prejudice on the following grounds:

1. On April 16, 2007, Plaintiff by and through its counsel filed a *Notice of Motion* and an *Affirmation as to Default* [docket no. 23](hereinafter referred to as **"Default Motion"**). This motion

respectfully requests that this Court deny the Default Motion as to Glass with prejudice.

2. Paragraph 1 of the Default Motion states that the above-captioned Defendants committed several acts of trademark and service mark infringement and several violations of the Lanham Act and NY State laws. Significantly, Plaintiffs have not presented any evidence that Glass at any time behaved in violation of any state or federal laws. In the absence of any such evidence, this Court should find that it is time to put an end to this frivolous litigation that has been a burden on the Court for almost two years.

3. Paragraph 2 of the Default Motion states that Plaintiff is seeking to have Glass cease and desist all association with Plaintiff. Plaintiff and Plaintiff's counsel have full knowledge that on July 15, 2005, Glass ceased any association or involvement with Plaintiff or any of its businesses. A. Glass, *Affidavit In Opposition to Order to Show Cause*, 8 March 2006, at ¶ 18 [Exhibit A, attached](hereinafter "**Glass Affidavit**").

4. Furthermore, Glass directed all persons, newspapers, advertisers, towing companies, and others working in concert with Glass to cease any use of Plaintiff's name or business. *Glass Affidavit*, at ¶ 19.

5. To the best of Glass's knowledge, all advertising using Plaintiff's name ended as of September 1, 2005. *Id.* at ¶ 20. Significantly, the advertising employed by Glass involved payment and placement weeks and months in advance. Therefore, it was impossible

for Glass to end all advertising immediately upon his direction to the outlets to end the advertising. Some advertising made its way to locations as far away as California thanks to the power of the internet. Periodicals published quarterly or semi annually simply could not and would not pull their publications off the stands or out of circulation because of a dormant ad.

6. But, it is uncontroverted that Glass had ceased to engage in any involvement with Plaintiff as of July 15, 2005 – almost six months before Plaintiff's Order to Show Cause was first filed on 4 January 2006 [docket no. 2], and over a year before the 13 November 2006 Stipulation [docket no. 19](the **"Stipulation"**).

7. It was our belief that the Stipulation ended all matters in dispute in this litigation and the Court thought so as well when it dismissed this case on 14 November 2006.

8. But when the Plaintiff's attorneys realized that the terminating of the case meant they would not be compensated for their time, they decided to reopen this case in an effort to collect damages where no damages could possibly be inferred from the tortured history of this case or this relationship. There is no other reason for the perpetuation of this burden on Glass and the Court.

9. Paragraphs 3 through 5 of the Default Motion state that this action was commenced by the filing of a summons and complaint. But there was no complaint ever filed in this matter. There was no summons

ever filed or served. On 4 January 2006, only two documents were filed: a three page Show Cause Order [docket no. 2] and a 61 page Affidavit in Support [docket no. 1].

10. Nowhere in these 64 pages of documents was there to be found a summons or a complaint. Nor has any summons or complaint ever been filed in this case. Contrary to Plaintiff's assertion in ¶ 24 of the Default Motion, there was no correction to the simple fact that a complaint has never been filed or served in this matter.

11. We respectfully request that the Court review all the documents filed in this Court and the Court will discover as did we, that no complaint or summons has ever been filed or served in this matter. The Plaintiff's proffered, filed, and submitted Affidavits of Service [docket no. 4] are thus a fraudulent misrepresentation to this venerable Court.

12. The Affidavit [docket no. 1] begins by referencing the summons and complaint. That would indicate that the Plaintiff's were aware of Fed. R. Civ. P 3 & 4 that require that a complaint be filed to commence an action.

13. But now, Plaintiff's counsel desires that the court dismiss Rule 3 as a mere technicality. Rule 3 says quite simply, *"A civil action is commenced by filing a complaint with the court."* Fed. R. Civ. P 3.

14. That is it. That is the total length and breadth of Rule 3. It does not leave open to speculation that there may be other ways to commence a civil action. It does not say that a civil action may be

commenced by providing a copy of a draft of Plaintiff's intended complaint to the prospective defendant. It does not say that a civil action may be commenced by seeking a show cause order and filing an affidavit in support. It says quite simply that a complaint is required to commence a civil action and that the complaint must be filed with the court. It makes no mention of whether the complaint should be served on the defendant; that is the subject of Rule 4. In this case Plaintiff has done neither and now wants this Court to find Rule 3 is just a frivolous technicality that the Court, any Court, may disregard so that these attorneys can get paid for their efforts in this meritless matter.

15. Fed. R. Civ. P 4 requires that a Summons be served with the complaint. Rule 4 states in relevant part: *"The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint."*

16. The purpose of these rules is to allow prospective defendants a fair opportunity to defend themselves in the event that the Plaintiff's charges prove to be false or unsupported by the facts, as is the case here.

17. We cannot assume that an unsigned, unexecuted, unfiled, and unverified draft of a complaint is the actual complaint that will be

filed by the Plaintiff. We cannot assume that the charges in an unexecuted or unfiled complaint will be the actual charges that are filed against the defendant. No defendant should have to engage in a guessing game to try to determine what are the Plaintiff's complaints and thereby engage the expensive process of responding to charges that may not survive the Plaintiff's edits or fail to respond to charges that were not included in some prospective document.

18. But where, as here, there is no evidence of any violation of any law by the defendant; the defendant cannot be expected or required to file an answer to an unfiled complaint.

19. In ¶ 16 of the Default Motion Plaintiff asserts that on December 19, 2006 this attorney communicated our intention to file an answer to the complaint. And, we did intend to file an answer. But we never found a filed complaint to answer to. We even notified the Plaintiff about this and gave them an opportunity to correct the problem; to no avail. Default Motion, at ¶ 21. To this date, Plaintiff has yet to file a complaint or serve a summons on Glass. The only documents that we found we believed had been properly dispatched by the Stipulation and no further action was required on our part.

20. The Default Motion claims in ¶ 23 that we are blaming a technicality in the filed service affidavits for our refusal to answer the complaint. That further illustrates how detached from the facts of this case Plaintiff's counsel is. There is no defect in the affidavits of service –

except for the fact that they make fraudulent claims - and, we have never claimed that there was. There simply is no complaint to answer to.

21. In ¶ 26 of the Default Motion Plaintiff claim that the complaint was annexed as Exhibit A of the show cause papers that we received. We cannot determine what Exhibit A Plaintiff is referring to. The Court will note that the Show Cause Order [docket no. 2] had no exhibits and Exhibit A of the Affidavit [docket no. 1] contained the contract between the Plaintiff and Glass.

22. Plaintiff goes on to assert that Attorney Ghenya Grant acknowledges receipt of the complaint in her statements. Default Motion at ¶¶ 27-29. Firstly, receipt of a draft complaint is not required to commence a civil action, filing with the court is. Fed. R. Civ. P. 3. Secondly, Ms. Grant was referring to the information contained in the 61 page affidavit when she was responding to Plaintiff's show cause order. Ms. Grant will submit an affidavit to that effect before the hearing on this matter.

23. Finally, Plaintiff wants to argue for damages. Default Motion ¶ 10. But there were no damages. As the Glass Affidavit shows, the relationship between the parties never lasted long enough for there to be any damages. Glass Affidavit, at ¶¶ 4 -13. The initial agreement was reached on March 7, 2005 and their written contract was executed on May 25, 2005. Less than two months later it was over. Very little of any

consequence was actually accomplished and there is no basis for damages on the part of the Plaintiff.

24. On the other hand, the Defendant has suffered substantial damages. Id., at ¶¶ 22-25. We actually hoped to receive a properly filed complaint so that we could file a counter-claim.

25. For the statement of facts in this case and answers to the specific charges and countercharges raised in the Plaintiff's papers, we refer the Court to the Glass Affidavit and to Ms. Grant's Affidavit of March 9, 2006 [docket no. 9].

WHEREFORE we pray that Defendants Arthur Glass and Cars That Help, Inc. be granted the relief sought herein; that the Default Motion be denied with prejudice; and any other remedy that this Court may deem just and proper.

DATED: April 30, 2007

Respectfully submitted,
PESANTE & GRANT

Wilfredo Pesante, Esq.
NY State Bar No.: 273-1693
217 Merrick Road
Suite 206
Amityville, New York 11701
Telephone: 1 (631) 374-6882
Cellular Telephone: 1 (703) 626-1753
Facsimile: 1 (419) 710-6814
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 30th[h] day of April, 2007, I served a true and correct copy of the foregoing *Opposition to Motion for a Default Judgment* via electronic mail and facsimile to the parties listed below:

JOHN F. NAVARETTA, ESQ.
GINA HOWARD, PC
291 Jackson Avenue
Syosset, New York 11791
Telephone: (516) 364-6444
Fax: (516) 364-5005

Wilfredo Pesante, Esq.

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

FEEL BETTER KIDS, INC, AND FBK

Plaintiffs,

-against-

KIDS IN NEED, INC KIDS IN NEED USA, INC
CARS THAT HELP, INC. AUTO GOBBLER PARTS, INC.,
"JOHN DOE COMPANIES" fictitious names for presently
unidentified entities more fully described hereinbelow,
ARTHUR GLASS, IN HIS OFFICIAL CAPACITY as
President of KIDS IN NEED USA, INC. ARTHUR GLASS in
his official capacity as President of CARS THAT HELP, INC.
and ARTHUR GLASS, individually,

Defendants.

AFFIDAVIT
In Opposition to Order to Show Cause

---X

Arthur Glass being duly sworn deposes and says:

1. I am the President of the Cars that Help, Inc.(hereinafter referred to as "CTHI"), organized and existing under the laws of the State of New York, having its principal place of business at 53 Woodside Avenue, Staten Island, New York 10304, and a named Defendant in this action.

2. I am submitting this affidavit in opposition to Plaintiff's Order to Show Cause seeking a Preliminary Injunction, and in support of Defendant's Motion to lift the Temporary Restraining Order.

3. CTHI is a for-profit corporation engaged primarily in the business of facilitating vehicle donations to local charities.

4. On or about March 7, 2005, Cars that Help, Inc. entered into an agreement with Feel Better Kids, Inc. (hereinafter referred to as

"FBKI") a charity located in Island Park, New York to assist the organization with fundraising through a car donation program.

5. Subsequently, on or about May 25, 2005 I, signed a written contract with Feel Better Kids.

6. As part of the contract, FBKI authorized CTHI to use the name Feel Better Kids to advertise for automobile donations, from March 7th 2005 to December 31, 2005.

7. In exchange for authorized use of the Feel Better Kids name, I was required to pay $500 per month to FBKI.

8. In addition to monetary compensation, the only obligation that that I had to FBKI was to provide FBKI with a receipt for each auto donation.

9. During the course of our agreement, I was contacted by Christopher Gigante who indicated that I needed to be registered with the Attorney General's Office to continue facilitating donations for FBKI.

10. On or about, April 18, 2005, I posted a $10,000 bond and submitted the application for registration to the New York State Attorney General.

11. On or about July 9, 2005, I received notification from the New York State Attorney General's Office that my application needed to be corrected.

12. On or about July 11th 2005, I received a letter from Christopher Gigante indicating that he no longer wished to do business

with my company and that I cease and desist using the name Feel Better Kids because he did not want to be associated with a company who was not following the rules of the Attorney General.

13. This was untrue and a breach of our May 25th Contract because I filed the application and posted a bond as required by the Attorney General's Office.

14. If given the time and opportunity, I would have made corrections to the application for registration to comply with the Attorney General's Regulations.

15. During the course of the agreement, in all other respects, I honored the spirit of the agreement by placing ads to solicit donations for the charity.

16. After receiving the letter I was both puzzled and disappointed because I believed that I had acted in accordance with our written agreement, and looked forward to assisting the charity in raising money for a worthy cause.

17. I believed that Feel Better Kids had approved the use of the name in advertising until December 31, 2005.

18. Although I believed that I had the right to use the Feel Better Kids name for the duration of the calendar year, out of courtesy and respect for the charity, on or about July 15th 2005 I began discontinuing advertising using the Feel Better Kids name.

19. I have used my best efforts to stop all advertisements that publicize the Feel Better Kids Car Donation Program and have taken steps to contact several publications to terminate advertising contracts (see attached letters).

20. To the best of my knowledge all advertising ended as of September 1, 2005.

21. I have not been contacted by Christopher Gigante or the Feel Better Kids charity directly, to discuss this matter, since I received the cease and desist letter on or about July 12, 2005.

22. In the interim, I have suffered tremendous damage to my business, and my personal and professional reputation.

23. I have received telephone calls from individuals who have indicated that Christopher Gigante and FBKI has referred to me and CTHI as a "fraud" and have otherwise indicated that I have engaged in unscrupulous, illegal activity.

24. I have received telephone calls from individuals who have stated that they have been urged by Christopher Gigante and FBKI not to donate cars to CTHI.

25. As a result of Christopher Gigante's actions to defame me and my company, the response to my ads have dropped significantly.

Arthur Glass

Sworn before me this 8th day
Of March 2006

Notary Public

JOSEPH BRUNDALE JR.
Notary Public, State of New York
No. 01BR4984378
Qualified in Richmond County
Term Expires July 22, 20__

Arthur Glass

NY Daily News

From: Buchalter, Saul [sbuchalter@nydailynews.com]
Sent: Monday, January 23, 2006 10:42 AM
To: Arthur Glass
Subject: RE: car donation ads - another thought

HI Arthur,

You didn't have an ad run on Aug. 2. The last ad to run before Aug. 3rd was July 19, which I will get to you.

-----Original Message-----
From: Arthur Glass [mailto:marketingpro@si.rr.com]
Sent: Monday, January 23, 2006 10:13 AM
To: Buchalter, Saul
Subject: car donation ads - another thought

Could you also fax over August 2nd ad so we can see change.

Arthur Glass

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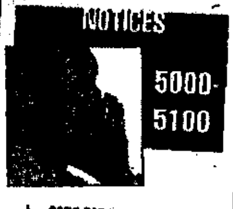

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ACURA 2.2 CL 1997 - 5 speed, V-Tech, leather, spoiler, CD, new timing belt, 105k highway miles, showroom cond, many, more options. $6,500 516-868-7386

FERRARI 95' 348 SPIDER- All service records & books. Red, black, tan. Exc. cond must sell due to prkg. $64,950 Owner 917-470-2220/212-532-3446

Honda Accord, 99', Exc cond, A/C, sun rf, pwr win/drs, loaded, 39K mil, garage kept, looks new! $8,000. Call owner: 917-693-0874 or 718-738-9259

HONDA ACCORD LX 1992- 4 door, 146K mi, full power, Cassette, tinted windows, Metallic Grey, Needs engine $1,695 neg. Call 718-512-5174

DODGE NEON SRT4 2004: 11 KMI. (Bought 2003) All MOPAR Upgrades: Stage 3, Coilover, Exhaust, BOV, $23,000 Nego. 718-327-0300 Lv. message

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4 Door Auto Pwr strng, brks, wndws Runs & looks good. 80K mi. No dents or rust. $2800. Owner 718-491-3469

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Daily News Classifieds are online at nydailynews.com

PONTIAC FIERO '88
Red, AC, sunrf, 4 cyl, Am/Fm, 6-CD changer, spoiler, $1200. 718-389-3082

MERCURY MOUNTAINEER 1996 4 dr, exc. cond, V8, dual pwr seat, a/c, running board, CD/am/fm stereo, sunrf, airbag. $7900 Owner 718-547-9196

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FORD ECONOLINE 250 2001: 75K Miles, AC, Excellent, Condition, Good for Cargo Use. Call 212-363-0804

FORD TAURUS WAGON SE '02 Fully loaded with 3rd seat and roof rack, Excellent condition $5950. Call Owner 718-253-2657

Plymouth Voyager 1992: 4 Captain's Chairs, Excel. Cond. 109 KMI. am/fm cass, clean & very well maintained, reliable. $1,900. Owner 718-894-0610

DODGE RAM 1500 SLT 1996 Pick-up. V8, AC, auto, full power, reg cab, 8 ft bed, Runs/looks exc. Ask $3,550. Call Owner 212-957-2877 / 347-564-9722

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Outside NYC
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NY Post

Arthur Glass

From: Anthony, Maureen [MAnthony@nypost.com]

Sent: Monday, January 23, 2006 11:08 AM

To: Arthur Glass

Subject: RE: car donation ads

From my research you requested the change around the 15th, but you had stopped your advertisement on the 19th.

The changed went into effect from August 2nd. I will fax you a copy. I need the fax number to send it to.

Thanks

Maureen

-----Original Message-----
From: Arthur Glass [mailto:marketingpro@si.rr.com]
Sent: Monday, January 23, 2006 10:00 AM
To: Anthony, Maureen
Subject: car donation ads

Maureen:

Can you check your records and see when we started advertising in the name Kids in Crisis which was sometime in June or July.

Also we would like to have a copy of tear sheet of our first ad with the date of the newspaper visible. Do you think you can do that for us?

Arthur Glass

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To: Arthur Gless
From: Maureen Anthony - New York Post

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Place an ad to donate your car in Post Classified Autos

Mr. Arthur Glass
Advertising Advantage
53 Woodside Avenue
Staten Island, NY 10304
March 9, 2006

Dear Arthur,

I am writing this letter to acknowledge that your office contacted my company to change the name in your Charity ad back in July. Due to a production error, the wrong ad continued to be published in Herald Newspapers and PrimeTime Shoppers with Feel Better Kids as the charity. As per your instructions, we should have changed the name in July to Lydia's House For Women.

We are sorry for any inconvenience this may have caused. The Lydia's House For Women ads will be appearing beginning with the March 11th issue.

Thank you for your continued business.

Sincerely,
Carol Sanders
Account Executive
Richner Communications, Inc.

Mr. Arthur Glass
Advertising Advantage
53 Woodside Avenue
Staten Island, NY 10304
March 9, 2006

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